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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1481

UNION CAMP CORPORATION,
Petitioner,

vs.

GYPSUM CARRIER, INC. AND OCEANIC CARRIER, INC. AS BAREBOAT CHARTERER AND OWNER RESPECTIVELY OF THE MOTORSHIP "PACIFIC CARRIER", PETITIONING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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2. Whether a Land-based Manufacturer Engaged in a Non-maritime Industry, Has a "Significant Relationship to Traditional Maritime Activity" or a "Substantial Connection with Maritime Activities or Interests" So As to Bring It Within Admiralty Jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

UNION CAMP CORPORATION,
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vs.

GYPSUM CARRIER, INC. AND OCEANIC CARRIER, INC. AS BAREBOAT CHARTERER AND OWNER RESPECTIVELY OF THE MOTORSHIP "PACIFIC CARRIER", PETITIONING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Union Camp Corporation respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 8, 1974.

I. OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, rendered February 8, 1974, is reported at 489 F.2d 152 and is attached hereto as Appendix A. The judgment pursuant to said opinion is attached hereto as Appendix B.

The Order of the Court of Appeals for the Fifth Circuit dated March 7, 1974 staying the issuance of the Mandate

is attached hereto as Appendix C. The order of the United States District Court for the Southern District of Georgia, Savannah Division, dated January 3, 1973, not reported, is attached hereto as Appendix D.

II. JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit were made and entered on February 8, 1974. The issuance of the mandate was stayed by the Fifth Circuit by order dated March 8, 1974. This petition for a writ of certiorari has been filed within ninety (90) days of February 8, 1974 and within thirty (30) days of March 8, 1974.

The jurisdiction of the lower courts and of the Supreme Court is invoked under 28 U.S.C.A. §1254(1); 28 U.S.C.A. §1333(1); and 28 U.S.C.A. §2101(c).

III. QUESTIONS PRESENTED

Petitioner Union Camp Corporation (hereinafter "Union Camp") is a land-based pulp and paper manufacturer having a plant located on the Savannah River in Savannah, Georgia. On the night of April 23, 1971, the vessel "Pacific Carrier" collided with a bridge spanning the Savannah River, which bridge is owned by the Seaboard Coast Line Railroad Company. When Seaboard brought suit against the vessel in admiralty, the bareboat charterer and owner of the "Pacific Carrier" (hereinafter "Shipowners") filed a cross-claim and a third party complaint against Union Camp. Union Camp thereafter filed a motion to dismiss for lack of admiralty jurisdiction, and on January 3, 1973, the District Court sustained Union Camp's motion and dismissed the cross-claim and third party action against Union Camp for lack of admiralty

jurisdiction. By judgment dated February 8, 1974, the Court of Appeals reversed. The questions presented are:

1. Whether a land-based manufacturer, engaged in a non-maritime industry, is subject to admiralty jurisdiction when, by the sole chance of wind direction, emissions from its smokestacks are allegedly blown across a navigable waterway and are purported to be a proximate cause of a collision between a vessel and a bridge spanning the navigable waterway.

2. Whether a land-based manufacturer, engaged in a non-maritime industry, has a "significant relationship to traditional maritime activity"[1] or a "substantial connection with maritime activities or interests"[2] so as to bring it within admiralty jurisdiction.

IV. STATUTES INVOLVED

The pertinent provisions of §1333, Title 28, United States Code, dealing with the jurisdiction of United States District Courts:

> "The District Courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or of maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

V. STATEMENT OF THE CASE

Union Camp is a land-based pulp and paper manufacturer which has a plant located on the Savannah River in Savannah, Georgia, and it is seeking review by the

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1. *Executive Jet Aviation, Inc.* v. *City of Cleveland Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

2. *Peytavin* v. *Government Employees Ins. Co.*, 453 F.2d 1121 (5th Cir. 1972).

United States Supreme Court of the opinion and judgment of the United States Court of Appeals for the Fifth Circuit of February 8, 1974 holding that Union Camp is subject to admiralty jurisdiction in this litigation.

On April 23, 1971, the vessel "Pacific Carrier" collided with a bridge spanning the Savannah River, which bridge is owned by the Seaboard Coast Line Railroad Company.

Seaboard brought suit against the vessel in admiralty, and thereafter the Shipowners instituted a limitation of liability proceeding in admiralty and filed a cross-claim and third party complaint impleading Union Camp pursuant to Rule 14(c) of the Federal Rules of Civil Procedure. Jurisdiction of the respective claims is based upon 28 U.S.C.A. §1333(1).

The Shipowners allege that Union Camp was negligent in failing to control its emissions on land and that this negligence obliterated visibility of the bridge and was a proximate cause of the collision. In essence, the claim is simply that, by the fortuitous circumstances of wind direction, emissions from the land-based plant were allegedly blown over the Savannah River and a proximate cause of the collision between the vessel and the bridge. The Shipowners make no allegation that Union Camp is engaged in any maritime activity, or that Union Camp was a party to a maritime collision, or intentionally placed any object in or above the Savannah River which obstructed navigation.

Union Camp thereafter filed a motion to dismiss the impleader claims of Shipowners; and, by order dated January 3, 1973, the District Court sustained Union Camp's motion to dismiss Shipowners' claims against it for lack of admiralty jurisdiction. In his order, the Honorable Alexander A. Lawrence relied upon the recent Fifth Circuit

decision in *Peytavin* v. *Government Employees Insurance Co.*, 453 F.2d 1121 (5th Cir. 1972) and upon the recent Supreme Court decision in *Executive Jet Aviation, Inc.* v. *City of Cleveland, Ohio*, 409 U.S. 249, 34 L.Ed.2d 454 (1972). In the course of his order, Judge Lawrence stated as follows:

> "In the light of *Executive Jet* only one course lies before this Court. The motion of Union Camp to dismiss the third party action for lack of admiralty jurisdiction must be sustained."

When the District Court granted Union Camp's motion to dismiss, Shipowners filed an appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C.A. §1292(b).

By opinion and judgment entered on February 8, 1974, the Fifth Circuit reversed the District Court and held that the claims asserted against Union Camp are maritime in nature and within admiralty jurisdiction.

VI. REASONS FOR GRANTING THE WRIT

The subject decision by the Fifth Circuit holding that Union Camp is subject to admiralty jurisdiction is in direct conflict with the recent decision of this Court in *Executive Jet* and with the recent decision of the Fifth Circuit in *Peytavin*. The resulting uncertainty leaves the guidelines for determining admiralty tort jurisdiction totally unresolved and calls for the exercise by this Court of its judicial supervision to settle these important differences.

A.

Conflict with Peytavin Decision

In 1972, the Fifth Circuit in *Peytavin* established a new criteria for determining admiralty tort jurisdiction

by requiring that the circumstances of the suit must demonstrate substantial connection with maritime activities or interests. Accordingly, the Fifth Circuit held that admiralty jurisdiction did not exist over a claim involving injury to plaintiff Peytavin while on a floating pontoon on the Mississippi River, even though the Court acknowledged that the incident occurred on navigable waters. In the course of its opinion, the Fifth Circuit departed from the "strict locality" and "location plus maritime connection" tests and broke new ground by stating at page 1127:

> "In view of the metamorphosis which the traditional maritime tort jurisdiction rule has undergone since *The Plymouth* sailed over one hundred years ago and the difficulty in applying its modern-day progeny to the facts of this case, we find it appropriate to note that in general the Courts have denied maritime tort jurisdiction where the circumstances of a suit failed to demonstrate any substantial connection with maritime activities or interests."

The dynamic thrust of *Peytavin* is the development of a subject matter test for determining admiralty tort jurisdiction, for the Fifth Circuit has broadened the inquiry far beyond technical locality to a consideration of *all of the circumstances* of a particular claim. At pages 1126-1127 of its opinion, the Fifth Circuit in *Peytavin* states that *the parties involved* and *the nature or apparent cause of the accident* are "circumstances of a suit"; and, in the case at bar, Union Camp (a potential party) has no connection with maritime activities or interests; and the nature or cause of the accident (alleged windblown emissions from smokestacks of a land-based manufacturer) is even more unrelated to maritime activities or interests.

The significance of the *Peytavin* decision cannot be overemphasized; and where, as here, the party involved

(Union Camp) and the alleged cause of the accident (wind-blown emissions) have no connection with the maritime interests; the Fifth Circuit committed error and rendered a decision in direct conflict with *Peytavin* by holding Union Camp subject to admiralty jurisdiction.

B.

Conflict with Executive Jet Decision

Less than a year after the new guideline was established in *Peytavin*, the Supreme Court in *Executive Jet* affirmed the *Peytavin* principle by requiring that, before admiralty tort jurisdiction will be asserted:

> "THE WRONG MUST BEAR A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITIES" (34 L.Ed.2d at 467).

The *Executive Jet* decision stands for the proposition that the locality of a maritime tort is insignificant if it is not supported by other circumstances involving significant maritime relationship, for this Court ruled that admiralty jurisdiction did not exist where an aircraft struck seagulls during take-off over land and crashed into Lake Erie. The requisite locality (Lake Erie) exists in *Executive Jet*, but no more, for the alleged negligence (failure to control seagulls over the runway) and the effect thereof had no relationship to admiralty.

In the case at bar, Shipowners' allegations against Union Camp involve negligence in failure to control emissions. Union Camp is shore-based, and necessarily the alleged negligent act in failing to control emissions took place over land. Furthermore, this alleged negligence became operative over land when the emissions were acted upon by the intervening force of wind, and, it is wind, not Union Camp's alleged negligence, that allegedly placed the emissions over the Savannah River.

The Fifth Circuit in the case at bar was in error in stating that the holding in *Executive Jet* is confined to aircraft,[3] for there is a direct analogy between *Executive Jet* and the case at bar as is indicated by the following chart:

EXECUTIVE JET	UNION CAMP
1. Defendants are non-maritime (City of Cleveland, Ohio and employees of the airport).	Petitioner is non-maritime (a land-based manufacturer engaged in non-maritime industry).
2. Alleged negligent act of defendants involves failure to keep airport runway free of seagulls.	Alleged negligent act of defendant involves failure to control emissions of smoke.
3. Alleged negligent act became operative over land, when seagulls hit the aircraft.	Alleged negligent act became operative over land, when wind carried the emissions.
4. The aircraft happened to land in the water.	The emissions happened to be carried by the wind over the Savannah River.
5. The defendant, City of Cleveland, had no control over where the aircraft landed.	Union Camp had no control over where the wind carried the smokestack emissions.
6. The maritime locality is wholly fortuitous, for what if the aircraft had crashed on land?	The maritime locality is wholly fortuitous, for what if the wind had blown the emissions over land? (The other way).

3. "The holding in *Executive Jet* . . . is confined of course to aircraft."

The direct conflict between the subject decision by the Fifth Circuit and *Executive Jet* is clearly apparent. In *Executive Jet,* there is absolutely no maritime connection until the aircraft *happened* to fall in the water, and this Court found no admiralty jurisdiction. In the case at bar, there is likewise absolutely no maritime connection involving Union Camp until the wind allegedly happened to blow the emissions over the Savannah River, and yet the Fifth Circuit has held that Union Camp is subject to admiralty jurisdiction, notwithstanding that the same condition could emit from a land-based plant one-half (1/2) to one (1) mile or even further from the River. Certainly such a result attaching admiralty jurisdiction to such a land-based industry was never envisioned.

While Shipowners might argue that the effect of wind on Union Camp's stack emissions is not in the pleadings, Shipowners clearly alleged at paragraph 6 of the third party complaint and paragraph 5 of the cross-claim[4] that a proximate cause of the collision was a large volume of smoke "which descended upon the river without warning" during the final minutes of the vessel's approach toward the railroad bridge. Although wind direction is therefore clearly in the pleadings, the doctrine of judicial notice applies to the subject motions and may be taken by this Court at the appellate level. *Atlanta Gas Light Co.* v. *Southern Natural Gas Co.,* 338 F.Supp. 1039, 1041 (N.D. Ga. 1972); *State of South Carolina* v. *South Carolina Electric and Gas Co.,* 41 F.Supp. 111 (E.D. So. Car. 1941);

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4. "A proximate cause of the vessel's collision with the railroad bridge as aforesaid was a large volume of smoke, fumes, gases, etc., *which descended upon the river without warning* during the final minutes of the vessel's approach toward the railroad bridge and its 200-foot wide span opening. All visibility forward of the vessel and to either side was obliterated by the smoke, fumes, and gases, and *visibility ahead was not restored until seconds before the collision* by which time it was too late to make the necessary course correction." [Emphasis supplied]

and *United States* v. *Taylor*, 448 F.2d 349, 351-352 (5th Cir. 1971), cert. den. 404 U.S. 1024 (1972). Furthermore, courts take judicial notice of general climatic conditions, and an admiralty court takes judicial notice of "the existence, operation and effect of physical laws and phenomenon". *Spillway Marina, Inc.* v. *United States*, 445 F.2d 876, 878 (10th Cir. 1971); and *The S.C.L. No. 9*, 37 F.Supp. 386, 391 (E.D. Pa. 1939), aff'd 114 F.2d 964 (3rd Cir. 1940).

This Court in *Executive Jet* clearly requires that the *wrong* must bear a "significant relationship to traditional maritime activity".[5] In the case at bar, it is only the vagaries of wind direction which connects the alleged negligence of Union Camp with the alleged collision, and there is absolutely no connection between the alleged wrong (emissions from smokestacks) and traditional maritime activity. The Fifth Circuit has therefore clearly decided a federal question in a way in conflict with a decision of this Court.

C.

No Maritime Obstruction by Union Camp

Although neither Union Camp nor its alleged negligent act of failing to control emissions has any connection with maritime activities, the Fifth Circuit, in direct conflict to the requirement of *Executive Jet* that the nature of "wrong" must be analyzed, relies upon cases involving intentional obstruction to navigable waterways. However, the cases as cited by the Fifth Circuit as they relate to alleged obstruction of navigation are clearly distinguishable, for they all involve *intentional, continuous* and *prolonged obstruction* of waterways by such items as large

5. "The wrong must bear a significant relationship to traditional maritime activities." 34 L.Ed.2d at 467.

piles;[6] large bolts projecting underwater from a pier;[7] a thirty-foot pier;[8] a spindle rising from the deck of a sunken dredge;[9] and telephone wires strung across a river.[10]

Where intentional, continuous and prolonged obstructions in or on navigable waters result in a collision, there is no happenstance involved in the collision, as the "wrong" is constant. An object permanently constructed over, or under, navigable waters creates the very great probability of a collision with a vessel, which "circumstances" are totally distinguishable from the "wholly fortuitous" chance that wind direction might carry smokestack emissions from Union Camp over the Savannah River.

The alleged wrong of Union Camp of not controlling its smokestack emissions is *not* an intentional obstruction of navigation, and the reliance by the Fifth Circuit in the use at bar on "intentional" obstruction cases is clearly in conflict with the mandate of this Court in *Executive Jet* that the alleged wrong be carefully analyzed for its relationship to traditional maritime activities.

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6. *Philadelphia, Wilmington, and Baltimore Railroad Co.* v. *Philadelphia and Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1859), where a ship collided with piles.

7. *Leonard* v. *Decker*, 22 F. 741 (S.D. N.Y. 1884), where a vessel collided with underwater bolts.

8. *Atlee* v. *Packet Co.*, 88 U.S. (21 Wall.) 389 (1874), where a barge collided with a pier.

9. *Panama Railroad Co.* v. *Napier Shipping Co.*, 166 U.S. 280 (1896), where the spindle pierced a hole in the bottom of a ship.

10. *Southern Bell Telephone & Telegraph Co.* v. *Burke*, 62 F.2d 1015 (5th Cir. 1933), where a vessel's smokestack struck the telephone wires.

D.

Necessity to Settle Important Questions

Even though this Court in *Executive Jet* specifically addressed the issue of admiralty tort jurisdiction, this area remains largely unsettled in view of the instant decision by the Fifth Circuit. Furthermore, there is presently pending in the Supreme Court a petition for writ of certiorari in the case of *Kelly* v. *Smith*, 485 F.2d 520 (5th Cir. 1973), which also involves the guidelines for determining admiralty tort jurisdiction. Accordingly, Union Camp respectfully submits that the unsettled status, uncertainty of guidelines and conflicting limits of admiralty tort jurisdiction as stated above warrants that the Supreme Court exercise its judicial prerogative to settle the important questions involved herein by granting this petition for writ of certiorari.

VII. CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

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CERTIFICATE OF SERVICE

I, Kirk McAlpin, attorney of record for Petitioner Union Camp Corporation and a member of the bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States I have served the foregoing Petition for Writ of Certiorari on the Respondents by depositing copies of same in the United States mail, first class mail, postage prepaid, addressed to Respondents' counsel of record at his post office address as follows:

Mr. George H. Chamlee
26 East Bryan Street
P. O. Box 9523
Savannah, Georgia 31402

This 3rd day of April, 1974.

.....

KIRK MCALPIN
Counsel for Petitioner, Union Camp Corporation

APPENDIX A

In the Matter of The Complaint of Gypsum Carrier, Inc., Bareboat Charterer, and Oceanic Carrier, Inc., Owner of the MOTOR SHIP PACIFIC CARRIER, for exoneration from or limitation of liability.

GYPSUM CARRIER, INC., Third Party
Plaintiff-Appellant,

v.

UNION CAMP CORPORATION, Third Party
Defendant-Appellee.

No. 73—1651.

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1974.

Bareboat charterer instituted exoneration and limitation liability proceeding arising from collision of vessel with railroad bridge. The shipowner intervened. Charterer and owner subsequently filed third-party complaint and cross claim, respectively, against owner of paper mill and charged that smoke emitted by paper mill interfered unreasonably with vessel's use of the waterway and constituted a nuisance and an obstruction to navigation. The United States District Court for the Southern District of Georgia, Alexander A. Lawrence, Chief Judge, sustained paper mill owner's motions to dismiss third-party complaint and cross claim for lack of admiralty jurisdiction and interlocutory appeal was taken. The Court of Appeals, Ainsworth, Circuit Judge, held that claims asserted against owner of paper mill were maritime in nature and were within admiralty jurisdiction.

Reversed.

Admiralty (Key) 19

Claims of bareboat charterer and vessel owner for damages and recovery over against owner of paper mill arising from vessel's collision with railroad bridge which spanned waterway on theory that smoke emitted by paper mill interfered unreasonably with vessel's use of waterway and constituted nuisance and obstruction to navigation, that paper mill owner's activities violated Georgia Air Quality Control Act as well as federal regulations pertaining to navigation and that acts complained of were proximate cause of the collision were maritime in nature and were within admiralty jurisdiction. 28 U.S.C.A. § 1292; 46 U.S.C.A. §§ 183-189; Fed.Rules Civ. Proc. rules 14, 14(i), 28 U.S.C.A.; Code Ga., § 88-901 et seq.

Appeal from the United States District Court for the Southern District of Georgia.

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

AINSWORTH, Circuit Judge:

The question for decision in this matter is whether there is jurisdiction in admiralty of claims of the bareboat charterer and the owner of a vessel against a shore-based paper mill, engaged in a non-maritime manufacturing activity, on allegations that smoke emitted from the mill so obstructed navigation as to cause the vessel to collide with a railroad bridge spanning the waterway on which it was proceeding to sea.

On April 23, 1971, the M/S PACIFIC CARRIER, owned by Oceanic Carrier, Inc., and under bareboat charter to Gypsum Carrier, Inc., appellants herein, discharged a cargo of gypsum rock at Savannah, Georgia, and was proceeding downstream on the Savannah River ship channel

bound for Halifax, Nova Scotia. As the vessel approached a railroad bridge spanning the channel, it suddenly became engulfed in smoke, fumes and gases emanating from the smokestacks of a pulp and paper mill owned by Union Camp Corporation, situated on the bank of the channel immediately upriver from the bridge, causing loss of all visibility by the vessel's crew and resulting in a collision by the vessel with the bridge. Both bridge and vessel sustained heavy damage.

Seaboard Coast Line Railroad Company, owner of the bridge, immediately filed an in rem action for damages against the vessel and caused its seizure. Gypsum Carrier, Inc. thereafter instituted the present exoneration and limitation of liability proceeding (pursuant to 46 U.S.C. §§ 183-189), in which Oceanic Carrier, Inc., the shipowner, intervened. Gypsum and Oceanic later filed in this limitation proceeding a third-party complaint and cross-claim, respectively, under Rule 14(c), Fed.R.Civ.P.,[1] against Union Camp, the allegations contained therein charging that the smoke emitted by the paper mill interfered unreasonably with the vessel's use of the waterway and constituted

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1. Rule 14, Fed.R.Civ.P.:

Third-Party Practice

* * *

(c) *Admiralty and Maritime Claims.* When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff. As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

a nuisance and an obstruction to navigation. In the cross-claim of Oceanic there were further allegations that Union Camp's activities violated the Georgia Air Quality Control Act (Chapter 88-9, Code of Georgia) as well as federal regulations pertaining to navigation lights and signals (33 C.F.R. §§ 68.01-10 et seq.). The acts complained of were said to be the proximate cause of the collision. The parties sought damages and recovery over, and that all judgment of claimants in the limitation proceeding be entered against third-party defendant Union Camp under Rule 14(c), Fed. R.Civ.P.; and Oceanic sought in the event of a finding of mutual fault divided damages in accordance with the admiralty rule.

This appeal arises out of the district court's order sustaining Union Camp's motions to dismiss for lack of admiralty jurisdiction, the third-party complaint and cross-claim of shipowners against it.[2] An interlocutory appeal was authorized under 28 U.S.C. § 1292.

We have carefully analyzed the order of the district court which dismissed the impleader and cross-claim for lack of admiralty jurisdiction over Union Camp, as well as the two decisions on which the district judge apparently justified his conclusions, namely, Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), and Peytavin v. Government Employees Insurance Company, 5 Cir., 1972, 453 F.2d 1121. In our view, the cited cases not only do not support the conclusion reached by the district court, but to the contrary sustain admiralty jurisdiction herein. Accordingly, we reverse the order of the district court dismissing the impleader and cross-claim of shipowners against Union Camp.

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2. The district judge noted in his order that "diversity apparently exists between the shipowner and Union Camp. It is possible that some remedy is available to the shipowner at this stage of the litigation independently of admiralty."

A secondary issue raised below is whether the doctrine of ancillary jurisdiction extends to admiralty as well as to civil impleader so as to dispense with any requirement of an independent basis of admiralty jurisdiction to implead a third party under Rule 14(c), Fed.R.Civ.P. We do not reach this question inasmuch as the maritime nature of the claims herein furnishes the independent basis required for admiralty jurisdiction under the rule.

In *Executive Jet, supra,* a jet airplane, taking off from an airport adjacent to Lake Erie in Cleveland, Ohio, struck a flock of seagulls, causing it to crash and sink in the navigable waters of nearby Lake Erie. The owners of the airplane brought suit in admiralty for its loss. The question before the Supreme Court was "whether the petitioners' suit for property damage to the aircraft, allegedly caused by the respondents' negligence, lies within federal admiralty jurisdiction." 409 U.S. at 250, 93 S.Ct. at 495. The Court held that it did not, concluding that "maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases," 409 U.S. at 261, 93 S.Ct. at 501, and after a comprehensive discussion of the complexities of problems involved in the application of the strict locality test,[3] said further:

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3. The Supreme Court in *Executive Jet* expressed its dissatisfaction with such a test: "The petitioners' argument, if accepted, would make jurisdiction depend on where the plane ended up—a circumstance which could be wholly fortuitous and completely unrelated to the tort itself. The anomaly is well illustrated by the hypothetical case of two aircraft colliding at a high altitude, with one crashing on land and the other in a navigable river. If, on the other hand, the respondents' position were adopted, jurisdiction would depend on whether the plane happened to be flying over land or water when the original impact of the alleged negligence occurred. This circumstance, too, could be totally fortuitous. If the plane in the present case struck the birds over the Cleveland Lakefront Airport, admiralty jurisdiction would not lie; but if the plane had just crossed the shoreline when it struck the birds, admiralty jurisdiction would attach, even if the plane were then able to make it back to the airport and crash land there. These are hardly the types of distinctions with which admiralty law was designed to deal." 490 U.S. at 267, 93 S.Ct. at 504.

"All these and other difficulties that can arise in attempting to apply the locality test of admiralty jurisdiction to aeronautical torts are, of course, attributable to the inherent nature of aircraft. Unlike waterborne vessels, they are not restrained by one-dimensional geographic and physical boundaries. For this elementary reason, we conclude that the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.' It is far more consistent with the history and purpose of admiralty *to require also that the wrong bear a significant relationship to traditional maritime activity.* We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary." (Emphasis supplied.)[4]

409 U.S. at 268, 93 S.Ct. at 504.

The holding in *Executive Jet*, as indicated from the foregoing language of the opinion, is confined of course to aircraft. Nevertheless, the Court spoke with approval of the increasing tendency of Congress and the courts to predicate maritime jurisdiction generally on the relationship of the wrong to maritime activities instead of on the locality of the tort alone. In this respect it said:

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4. It is interesting to note that the Supreme Court did not irrevocably foreclose the possibility of characterizing as maritime even an aircraft under circumstances where the function of the airplane would parallel the function of the vessel: "An aircraft in that situation [flying from New York to London and crashing in the mid-Atlantic] might be thought to bear a significant relationship to traditional maritime activity *because it would be performing a function traditionally performed by waterborne vessels.*" (Emphasis supplied.) U.S. at 271, 93 S.Ct. at 506. In the instant case we have a *vessel* performing a function traditionally performed by a *vessel*, the transportation of cargo on navigable waters.

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, *reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.*" (Emphasis supplied.)

409 U.S. at 261, 93 S.Ct. at 501.

As an example of cases holding that admiralty jurisdiction was improperly invoked because the tort, while having a maritime locality, lacked a significant relationship to maritime navigation and commerce, the Court in *Executive Jet* cited Peytavin v. Government Employees Insurance Company, 5 Cir., 1972, 453 F.2d 1121, the second case relied on by the district court in dismissing the claims against Union Camp below. In *Peytavin,* we concluded that a claim for whiplash injuries sustained by an automobile passenger as the result of a rear-end collision with another automobile was not within the jurisdiction of admiralty, notwithstanding the fact that plaintiff's vehicle was parked on a floating pontoon in navigable waters. Our reasoning was that the claim lacked "substantial connection with maritime activities or interests." 453 F.2d at 1127.

Both *Executive Jet* and *Peytavin* represent a departure from application of the strict locality rule. They stress substantiality of the connection between the tort and maritime activities as a more realistic criterion. In the instant case, if locality of the tort were the only factor having a maritime connection, admiralty jurisdiction would be lacking. However, the locality of the tort, the Savannah River channel, where the "substance and the consummation

of the injury"[5] presumably occurred, is only one maritime-connected factor. This is not one of those "borderline" problem cases, alluded to in *Executive Jet*,[6] devoid of any relationship between the tort and traditional maritime activities other than location. The combination of factors in the instant case, in the context of admiralty jurisdiction, supplies what was lacking in *Executive Jet* and *Peytavin*—a substantial maritime connection. Unlike the aircraft in *Executive Jet* and the colliding automobiles in *Peytavin*, the motor vessel PACIFIC CARRIER is by its very essence maritime. The alleged cause of its collision with the railroad bridge, i. e., the smoke emitting from Union Camp's smokestacks, constituted a navigational hazard by obstructing the vision of the ship's crew. The activities of the shipowners at the time of the collision were essentially maritime—the transporting of cargo by vessel on navigable waters. Thus the fact that the agency said to have obstructed navigation here had a non-maritime origin is irrelevant to any issue since it caused injury to a vessel then under way on navigable waters. The maritime nature of the tort is therefore undeniable. *Executive Jet* and *Peytavin* are not opposed to our holding here; to the contrary, the propriety of our determination is supported by those decisions.

Appellee makes much of the fact that its paper mill is land based and engaged in a non-maritime industry,

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5. The traditional locality test for determining when a tort is within the admiralty jurisdiction historically dates back to The Plymouth, 70 U.S. (3 Wall.) 20, 35, 36, 18 L.Ed. 125 (1866): "[T]he wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction." Despite such broad language, the Supreme Court said in *Executive Jet*, "that this Court has never explicitly held that a maritime locality is the sole test of admiralty tort jurisdiction." 409 U.S. at 261, 93 S.Ct. at 499.

6. 409 U.S. at 259, 93 S.Ct. at 498.

in its attempt to avoid admiralty jurisdiction. But this fact is not decisive. *See* Kelly v. Smith, 5 Cir., 1973, 485 F.2d 520.[7] In *Kelly*, the issue presented was whether claims for injuries inflicted on waterborne, fleeing deer poachers, by hunting rifles fired from shore by club members of a private hunting club, were within admiralty jurisdiction. We analyzed *Executive Jet* and *Peytavin* and found that under the rationale of those decisions the circumstances in *Kelly* were sufficiently related to maritime activities to sustain admiralty jurisdiction. "[F]irearms—and the injuries they caused," we said, "are not so inherently indigenous to land as to preclude any maritime connection." 485 F.2d at 526. By analogy, smoke and the wind that blows it across a body of water, as well as the resultant hazard and obstruction to navigation, are much less inherently indigenous to land. The vessel in *Kelly* was a 15-foot outboard motor boat, being used as a getaway vehicle by the escaping poachers. By comparison the vessel here is an ocean-going, bulk-cargo carrier, actively engaged in maritime commerce at the time of the collision. We emphasized in *Kelly* the traditional concern of admiralty for the safety of maritime commerce, saying:

> "Policy militates toward admiralty jurisdiction in this case. The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation. Rifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient dan-

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7. "It should also be noted that, in attempting to determine exactly what constitutes a tort for maritime jurisdictional purposes, the courts have generally made 'tort' synonymous with 'injury', and have looked to the place where the impact causing the injury occurred, rather than to the place where the negligent act occurred." 7A, Moore, Federal Practice § .325 [2] n. 4.

> ger to maritime commerce for the federal courts of admiralty to assume jurisdiction . . ." 485 F.2d at 526.

When we consider the navigational hazards caused by blinding smoke and gases, as evidenced by the extensive damage both to vessel and bridge in this case, the *Kelly* parallel is clear. The tort claims of the shipowners here are of far greater substance in a maritime context than were those approved by us in *Kelly*.

Several cases cited by appellant, though pre-*Executive Jet*, are agreeable in principle with the holding in that case, and are pertinent to the issue of maritime jurisdiction here. Locality is still a viable consideration under *Executive Jet*, and it is apparent that the courts in the following cases stressed this principle. It is also true, as in *Executive Jet*, that these cases involved torts of a maritime nature. For example, in this circuit's case of Southern Bell Telephone & Telegraph Co. v. Burke, 5 Cir., 1933, 62 F.2d 1015, we were concerned with a libel in admiralty by a shipowner for injury to its vessel's smokestack while passing through the draw span of a highway bridge over a river and coming in contact with telephone lines strung from one bank of the river to the other. We rejected the respondent's contention that there was no jurisdiction in admiralty as follows:

> "The wrong and the injuries complained of having been wholly consummated while the steamer was traveling in the navigable waters of the United States, the claim based thereon is within the admiralty jurisdiction. Atlee v. Packet Co., 21 Wall. 389, 22 L.Ed. 619; Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co., 23 How. 209, 16 L.Ed. 433; Panama Railroad v. Napier Shipping Co., 166 U.S. 280, 17 S.Ct. 572, 41

L.Ed. 1004; Cleveland, Terminal & V. Railroad Co. v. Steamship Co., 208 U.S. 316, 28 S.Ct. 414, 52 L.Ed. 508, 13 Ann.Cas. 1215. We are of opinion that there is no merit in the suggestion to the effect that the asserted claim was kept from being cognizable in admiralty by the circumstance that the thing with which the steamer collided was connected solely with upland beyond the shore or border of the river, no part of it being in or covered by navigable waters. Gonsalves v. Morse Dry Dock Co., 266 U.S. 171, 45 S.Ct. 39, 69 L.Ed. 228; F. S. Royster Guano Co. v. Outten (C.C.A. 4 Cir.) 266 F. 484."

In The America, D.C., E.D.N.Y., 1940, 34 F.Supp. 855, a barge owner filed a proceeding in admiralty against the owner of a tanker with which it collided and defendant impleaded E. I. DuPont & Company on allegations that it allowed its shore-based plant to emit fumes or gases over the adjacent waters in such volume and density that claimant of the vessel was unable to navigate and to avoid doing the damage for which the libel was filed. To respondent's exception to the jurisdiction the court held:

"The following cases indicate that a cause in personam in admiralty exists, if it be proven that a tort arising on land takes effect on navigable waters, to the injury of a vessel on behalf of which the cause is asserted: Philadelphia, W. & B. R. R. Co. v. Philadelphia, etc., Co., 23 How. 209, 16 L.Ed. 433; Leonard v. Decker, D.C., [2 Cir.] 22 F. 741; Galena, D. D. & M. Packet Co v. Rock Island, etc., 6 Wall. 213, 18 L.Ed. 753; The Normannia, D.C., [2 Cir.] 62 F. 469, at 472; Hermann v. Port Blakely Mill Co., D.C., [9 Cir.] 69 F. 646; Dorrington v. Detroit, 6 Cir., 223 F. 232, at 242; Smith v. Lampe, 6 Cir., 64 F.2d 201."

In Smith v. Lampe, 6 Cir., 1933, 64 F.2d 201, two vessels collided in a thick fog allegedly because of the negligent signalling by respondent with the horn of his automobile to the vessels in the fog. Libelant contended that respondent's actions negligently interfered with the navigation of the boats and that the negligence was the proximate cause of the damage. The Sixth Circuit answered the jurisdictional question holding that the suit was properly brought in admiralty and rejected respondent's contention that "if any tort was committed, it was committed on land," thus making the action one at common law rather than admiralty. The court said that where the negligent act originates on land and the damage occurs on water, the cause of action is within the admiralty jurisdiction; that "the locality of the thing to be considered is that of the thing injured, and not of the agent causing the injury, and that when the injury is to a vessel afloat, even though the negligence originated on land, the tort is maritime, and within the admiralty jurisdiction." *Id.* at 202.

Whether we apply the criterion of *Executive Jet* and look to "the relationship of the wrong to traditional maritime activity," 409 U.S. at 261, 93 S.Ct. at 501, or the virtually identical test of *Peytavin* to determine if the tort has a "substantial connection with maritime activities or interests," 453 F.2d at 1127, we reach the definite conclusion that the claims asserted against Union Camp are maritime in nature and clearly within admiralty jurisdiction.

Reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1973

No. 73-1651

D. C. Docket No. CA 2798

In the Matter of: The Complaint of Gypsum Carrier, Inc., Bareboat Charterer, and Oceanic Carrier, Inc., Owner of the MOTOR SHIP PACIFIC CARRIER, for exoneration from or limitation of liability.

GYPSUM CARRIER, INC.,
Third Party Plaintiff-Appellant,

versus

UNION CAMP CORPORATION,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed;

It is further ordered that third party defendant-appellee pay to third party plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

February 8, 1974

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

March 8, 1974

600 Camp St. – Rm. 102
New Orleans, La. 70130

Mr. Kirk M. McAlpin
Attorney at Law
2500 Trust Co. of Ga. Bldg.
Atlanta, Ga. 30303

No. 73-1651 – In the Matter of: The Complaint of Gypsum Carrier, Inc., et al; Gypsum Carrier, Inc. vs. Union Camp Corp.

MANDATE STAYED TO: April 7, 1974

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a

copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Upon revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion & judgment which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

Edward W. Wadsworth, Clerk
By /s/ Carol LeSage
Deputy Clerk

enc.

cc: Mr. Stanley R. Wright
Messrs. George H. Chamlee
Gustave R. Dubus, III
Mr. Spencer Connerat, Jr.
Mr. Fred S. Clark
Mr. Manuel A. Sequeira, Jr.
Mr. Edward T. Brennan
Mr. W. J. Snowden
Mr. Courtney W. Stanton
Mr. Thomas S. Gray, Jr.
Messrs. Gignilliat & Abbott

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 2798

IN THE MATTER OF THE COMPLAINT OF GYPSUM CARRIER, INC., BAREBOAT CHARTERER AND OCEANIC CARRIER, INC., OWNER OF THE MOTOR SHIP "PACIFIC CARRIER", FOR EXONERATION FROM OR LIMITATION OF LIABILITY

GYPSUM CARRIER, INC.,
Third-Party Plaintiff,

vs.

UNION CAMP CORPORATION,
Third-Party Defendant.

ORDER

I held up decision on Union Camp Corporation's motion to dismiss the third-party complaint and cross-claim of Oceanic Carrier, Inc.[1] in the hope that light might be shed by the Supreme Court in a pending case involving the "strict locality" theory as to admiralty jurisdiction. Patience has been rewarded; hope fulfilled.

On December 18, 1972, the highest court handed down a unanimous ruling in *Executive Jet Aviation, Inc. et al.*

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1. The case originated as a libel *in rem* by Seaboard Coast Line Railroad Company against the vessel "Pacific Carrier" for alleged negligence in colliding with the plaintiff's bridge over the Savannah River on the night of April 23, 1971. Subsequently, Gypsum Carrier filed a complaint seeking exoneration and limitation of liability. It also brought a third-party action in admiralty against Union Camp Corporation under 28 U.S.C. § 1333(1).

v. *City of Cleveland et al.*, 41 LW 4085-4093. That case involved an aircraft that fell into Lake Erie as it took off from Cleveland as a result of engine ingestion of seagulls which had been on the runway. Negligence was predicated upon allowing the gulls to be on the runway and in not giving the pilot adequate warning of their presence.[2] Jurisdiction was based on the statute conferring jurisdiction on district courts in civil admiralty or maritime cases.

The Supreme Court laid to rest the controversial concept that the "strict locality" test governs existence of jurisdiction of admiralty courts. "[I]n determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." 44 LW 4089. The Court further said: "It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." p. 4091. That is what the Fifth Circuit held earlier in 1972 in *Peytavin* v. *Government Employees Insurance Co.*, 453 F.2d 1121. The Supreme Court listed the decision among lower court rulings holding that admiralty jurisdiction was not properly invoked "because the tort, while having a maritime locality, lacked a significant relationship to maritime navigation and commerce." p. 4087, n.6.

In the light of *Executive Jet* only one course lies before this Court. The motion of Union Camp to dismiss the

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2. The factual analogy is clear. It is alleged in Gypsum Carrier's third-party complaint that Union Camp negligently permitted emissions of smoke, fumes and gasses from its plant to obstruct the Seaboard Coast Line bridge and charged violation of Georgia air pollution laws. The third-party complaint alleges that as a result of these acts the "Pacific Carrier" collided with the structure.

third-party action for lack of admiralty jurisdiction must be sustained.

However, the motion is granted with directions. While admiralty is the jurisdictional predicate of the third-party complaint, diversity apparently exists between the shipowner and Union Camp. It is possible that some remedy is available to the shipowner at this stage of the litigation independently of admiralty. With that in mind, it is ordered and directed that the Order dismissing the third-party complaint of Gypsum Carrier, Inc. shall not become effective until February 5, 1973.

This January 3, 1973.

/s/ Alexander A. Lawrence
Chief Judge, United States
District Court